Chong Kon Yon v MBf Finance Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO C-02-827 OF 1995
MAHADEV SHANKAR, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
22 AUGUST 1996

Statutory Interpretation *— Duty of court — Hardship — Whether court could follow a construction of a statute that would cause great hardship to general public*

Unincorporated Associations *— Societies — Co-operative society — Assumption of control by order of Central Bank — Transfer of assets and liabilities of co-operative society to third party by order of Central Bank — Subsequent agreement between parties to exclude transfer of liability — Whether third party could be made liable to liability excluded by the agreement — Whether agreement had validly excluded such liability — Central Bank of Malaysia (Kewangan Usahasama Makmur Bhd Scheme) Order 1988*

The appellant, who was a building contractor, had entered into a contract with the first defendant, but before payment was made, the first defendant, Koperasi Serbaguna Gunung Emas Bhd, was placed under receivership. On 28 January 1988, the Central Bank of Malaysia (Kewangan Usahasama Makmur Bhd Scheme) Order 1988 ('the Order') was published and it transferred the assets and some of the liabilities of the first defendant to the second defendant. On 30 January 1988, the receivers of the first defendant and the second defendant entered into an agreement ('the agreement'); cl 4.04 of the agreement provided, inter alia, that the second defendant shall not be liable for the debts and liabilities of the first defendant in connection with the latter's business or other activities. The assets together with the transferred liabilities were subsequently transferred from the second defendant to the third defendant ('the respondent').

The issue was whether the respondent could be held liable for the debt of the first defendant. Counsel for the appellant argued that as at 28 January 1988, the liabilities of the first defendant had already been transferred to the second defendant and the words 'subject to any agreement' in the Order could not include an agreement made subsequently which in this case was two days later and that the contracting out of liability must be made before the Order was published. Further, the appellant contended that cl 4.04 had no effect because all the assets and liabilities of the first defendant were vested in and transferred to the second defendant and then to the appellant on the coming into force of the Order. On the other hand, counsel for the respondent argued that the words 'subject to any agreement' was grammatically capable of one meaning only and that was to cover all agreements on whatever date they were entered into, whether before or after the Order came into effect, and this was emphasized by the word 'any'.

Held, dismissing the appeal:

(1) The court would not follow a construction of a statute that would cause great hardship to the general public where another interpretation was available. To accede to the respondent's argument that the words 'subject to any agreement' in the Order would include an agreement entered into after the coming into force of the Order would cause great hardship and injustice in that it would be against the first defendant which had already become an empty shell, whose assets had been transferred to the second defendant and then to the respondent (see pp 341I and 342A–B); *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 and *Allen v Thorn Electrical Industries Ltd; Griffin v Metropolitan Police District Receiver* [1968] 1 QB 487 followed.

(2) The respondent could not be held liable for the purported debt of the first defendant to the appellant. This was because cl 4.04 of the agreement between the first defendant and the second defendant had validly excluded such liability. If the provisions of the Order had to be applied to all agreements made after the effective date, the Order should have explicitly stated so (see p 343F–H).

[Bahasa Malaysia summary

Perayu, yang merupakan seorang kontraktor bangunan, telah mengikat kontrak dengan defendan pertama, tetapi sebelum bayaran dibuat, defendan pertama, Koperasi Serbaguna Gunung Emas Bhd, diletakkan di bawah penerimaan. Pada 28 Januari 1988, Perintah Bank Negara Malaysia (Skim Kewangan Usahasama Makmur Bhd) 1988 ('Perintah tersebut') diterbitkan dan ia memindah aset dan beberapa daripada liabiliti defendan pertama kepada defendan kedua. Pada 30 Januari 1988, penerima defendan pertama dan defendan kedua mengikat suatu perjanjian ('perjanjian tersebut'); fasal 4.04 perjanjian tersebut memperuntukkan, antara lain, bahawa defendan kedua tidak akan bertanggungjawab atas hutang dan liabiliti defendan pertama berhubung dengan urusniaga defendan pertama atau aktiviti lain. Aset bersama dengan liabiliti yang dipindah kemudiannya dipindah daripada defendan kedua kepada defendan ketiga ('penentang').

Isu adalah sama ada penentang boleh dikatakan bertanggungjawab atas hutang defendan pertama. Peguam perayu berhujah bahawa pada 28 Januari 1988, liabiliti defendan pertama telah pun dipindah kepada defendan kedua dan perkataan-perkataan 'tertakluk kepada mana-mana perjanjian' dalam Perintah tersebut tidak termasuk suatu perjanjian yang dibuat kemudiannya yang mana dalam kes ini adalah dua hari kemudiannya dan bahawa penarikan diri daripada liabiliti mesti dibuat sebelum Perintah tersebut diterbitkan. Selanjutnya, perayu berhujah bahawa fasal 4.04 tidak mempunyai kesan sebab semua aset dan liabiliti defendan pertama diletakhak dalam dan

dipindah kepada defendan kedua dan kemudiannya kepada perayu apabila Perintah tersebut mula berkuatkuasa. Sebaliknya, peguam penentang berhujah bahawa perkataan-perkataan 'tertakluk kepada mana-mana perjanjian' dari segi nahu mempunyai satu maksud sahaja dan ia merangkumi semua perjanjian pada apa-apa tarikh mereka diikat, sama ada sebelum atau selepas Perintah tersebut mula berkuatkuasa, dan ini dititikberatkan oleh perkataan 'mana-mana'.

Diputuskan, menolak rayuan:

(1) Mahkamah tidak akan mengikut suatu tafsiran statut yang akan menyebabkan kerumitan kepada masyarakat umum di mana tafsiran lain boleh didapati. Hujah penentang bahawa perkataan-perkataan 'tertakluk kepada mana-mana perjanjian' dalam Perintah tersebut akan termasuk sesuatu perjanjian yang diikat selepas Perintah tersebut mula berkuatkuasa, jika diterima, akan menyebabkan kerumitan dan ketidakadilan dalam ertikata ia akan menentang defendan pertama yang kini tidak mempunyai apa-apa fungsi, yang asetnya telah dipindah kepada defendan kedua dan kemudiannya kepada penentang (lihat ms 341I dan 342A–B); *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 dan *Allen v Thorn Electrical Industries Ltd; Griffin v Metropolitan Police District Receiver* [1968] 1 QB 487 diikut.

(2) Penentang tidak boleh bertanggungjawab atas hutang defendan pertama kepada perayu. Ini adalah kerana fasal 4.04 perjanjian antara defendan pertama dan defendan kedua telah mengecualikan liabiliti demikian secara sah. Jika peruntukan Perintah tersebut terpaksa dipakai kepada semua perjanjian yang dibuat selepas tarikh berkenaan, Perintah tersebut haruslah menyatakan begitu secara eksplisit (lihat ms 343F–H).]

Notes

For cases on duty of court in statutory interpretation, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1579–1588.

For cases on co-operative societies, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1636–1650.

Cases referred to

Allen v Thorn Electrical Industries Ltd; Griffin v Metropolitan Police District Receiver [1968] 1 QB 487 (folld)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (folld)

Legislation referred to

Central Bank of Malaysia Ordinance 1958 s 31B

Central Bank of Malaysia (Kewangan Usahasama Makmur Bhd Scheme) Order 1988

Appeal from: Civil Suit No 22–22 of 1992 (High Court, Kuantan)

Lim Kian Leong (*Lim Sung Yin* with him) (*Lim Kian Leong & Co*) for the appellant. A

Ranjit Singh (*Cheang & Ariff*) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): The question that arises here is whether the respondent, who was the third defendant in the proceedings below, can be held liable for the debt of the first defendant, Koperasi Serbaguna Gunung Emas Bhd. The appellant, who is a building contractor, had entered into a contract with the first defendant, but before payment was made, the first defendant was placed under receivership. B

On 28 January 1988, the Central Bank of Malaysia (Kewangan Usahasama Makmur Bhd Scheme) Order 1988 ('the Order') was published as PU (A) 9/88 transferring the assets and some of the liabilities of the first defendant to the second defendant, Kewangan Usahasama Makmur Bhd. The assets together with the transferred liabilities were subsequently transferred from the second defendant to the respondent. C D

The relevant parts of the Order are sub-paras (a) and (c) of para 4 which read as follows:

> 4 Subject to any agreement between the specified deposit-taker and Kewangan Usahasama Makmur Bhd, the following shall be deemed to be operative on the date of the coming into effect of this Order: E
>
> (a) any properties vested in or held by the specified deposit-takers, or their receivers, either alone or jointly with any other person, or any liabilities suffered by the specified deposit-takers or their receivers, either alone or jointly with any other person, shall, on and from the effective date be vested in or held by or be suffered by Kewangan Usahasama Makmur Bhd either alone or jointly with such other person, as the case may be; F
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> (b) ... ;
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> (c) any existing contracts to which the specified deposit-takers or their receivers were parties, whether in writing or not, shall have effect, on and from the effective date, as if Kewangan Usahasama Makmur Bhd had been a party thereto instead of the specified deposit-takers or their receivers; G
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> ...

The relevant agreement on 30 January 1988 between the receivers of the first defendant and the second defendant states at cl 4.04 as follows: H

> Purchaser not liable for co-operative's debts
>
> Save and except for those debts and liabilities taken over by the purchaser under this agreement, the purchaser shall not be in any manner liable for the debts and liabilities of the co-operative and the receivers in connection with the co-operative's business or other activities. I
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> Provided always that all operational costs and expenses incurred by the receivers up to 30 January 1988 shall be for the account of the receivers and thereafter these costs and expenses shall be incurred by the receivers as the purchaser's agent and the receivers shall be reimbursed by the purchaser accordingly.

A Learned counsel for the appellant had argued that as at 28 January 1988, the liabilities of the first defendant had already been transferred to the second defendant and the words 'subject to any agreement' in the Order cannot include an agreement made subsequently which in this case was two days later. He stressed that contracting out of liability must be before the order is published.

B

He had referred to *Allen v Thorn Electrical Industries Ltd; Griffin v Metropolitan Police District Receiver* [1968] 1 QB 487 where the defendant employers had agreed with the plaintiffs' representative that the plaintiffs, their employees, should receive wage increases as from 1 April and 31 August 1966 respectively. Before any increased wages had actually C been paid, the Prices and Incomes Act 1966, which was designed, inter alia, to enforce a temporary standstill in terms of employment, was passed. On claims by the plaintiffs for the increase in wages due under the agreements, the defendants contended that they could not lawfully pay such increased remuneration by reason of the effect of ss 28(2) and 29(4) D of the said Act respectively as applied to the plaintiffs' respective remuneration by art 2 of the Temporary Restrictions on Pay Increases (No 2) Order 1966 and art 2 of the Temporary Restrictions on Pay Increases (20 July 1966 Levels) (No 1) Order 1966. Those orders brought the sections into effect on 20 July 1966, in the case of the remuneration of one plaintiff, and on 24 November 1966 in the case of the other plaintiff; E and no increase in wages had actually been paid by the defendants before those dates.

On appeals by the respective plaintiffs against the decisions of county court judges dismissing their claims, it was held, allowing the appeals, that the words 'the rate of remuneration paid in ss 28(2) and 29(4) of the F relevant Act meant 'the rate of remuneration contracted to be paid' and not the amount actually paid before the prescribed dates when the Act came into operation as regards the plaintiffs' remuneration; and that, accordingly, since the plaintiffs were contractually entitled to the increased rates of remuneration before the prescribed dates, their claims succeeded.

G Per curiam, it was said that the word 'paid' must be construed in the context in which it appears in order to discover the appropriate meaning and existing legal rights are not to be taken away on an ambiguity in a statute; nor is a citizen to be penalized on an ambiguity.

Lord Denning MR had stated at p 502:

H

> Taken literally, the word 'paid' does mean actually paid in cash. It means the money which the man receives in his pay packet. That is how we were invited to construe it here. The draftsman of this Act was, it was suggested, a learned pedant who used words with meticulous accuracy. I decline to accept this invitation. We are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in I which we find them. The context here is 'the rate of remuneration paid'.

At pp 503 and 504, he said:

> In my opinion, therefore, in these sections, the words 'the rate of remuneration paid for the same kind of work' before a particular date, mean 'the rate of remuneration contracted to be paid for the same kind of work

done' before that date. If I were wrong in this view, I am clear that, at any rate, the requirement in the statute is ambiguous and uncertain: in which case the rights under the contract must prevail. No man's contractual rights are to be taken away on an ambiguity in a statute: nor is an employer to be penalized on an ambiguity.

Mr Allen and Mr Griffin were both entitled by contract to an increase in their wages before the prescribed date, that is, before 20 July in Mr Allen's case and 24 November in Mr Griffin's case. Their rate of remuneration was, I think, determined by the increased rate contracted to be paid for work done before that date; and not by the sum actually paid. The employers must keep to their contract and pay the increased rates. The statute by clear words could have required them to break their contract but the words are not sufficiently clear for the purpose.

I would allow both appeals.

At p 505, Danckwerts LJ said:

These statutory provisions are penal and are designed to interfere with rights of contract and the pre-existing legal position of free citizens of this country. Well-established principles, therefore, apply to the situation. Existing legal rights are not to be taken away except by clear words in the statute. If two constructions are possible, the construction which produces unreason and hardship is to be avoided, and the construction which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred.

Then, at pp 508 and 509, Winn LJ said:

One last opinion I express which has more general application than to these two appeals, and that is that I must reject as quite untenable any submission, such as I understood Mr Owen to make, that if in any case one finds: (a) that a statute is worded ambiguously in any particular respect; and (b) finds also clear indications aliunde that Parliament intended that they should have the strictest and most stringent meaning possible, the court is therefore compelled to construe the section in the sense in which Parliament would have desired it to take effect, by giving the words their most stringent possible meaning. On the contrary, I think the right view is, and as I understand it always has been, that in such a case of ambiguity, it is resolved in such a way as to make the statute less onerous for the general public and so as to cause less interference, than the more stringent sense would, with such rights and liberties as existing contractual obligations.

I think both these appeals should be allowed.

Learned counsel for the respondent had told the court that in the eighties, there was mismanagement of 24 deposit taking co-operatives and the government had come up with a White Paper. He referred to paras 4, 43 and 47 of the White Paper which are restated below:

4 On the whole, the DTCs were grossly under-capitalized, having borrowed high interest short-term deposits to finance long-term investments which yielded insufficient or no income to service the debt. A significant number of co-operatives also suffered from bad management, either due to lack of expertise or professionalism or through imprudent, and in some cases, corrupt management. This resulted in gross mismanagement of funds, such as over-investment in

land and property, with nearly one-fifth of assets in housing development projects and fixed assets, some of which were purchased at the height of the property market.

...

43 The financial position of the 24 DTCs investigated may be summarized as follows:

(1) The co-operatives are badly managed. Not only did many DTC management over-invest the assets of their DTC in land and shares, there were numerous instances of fraud, negligence, conflict of interest and possible criminal breach of trust. The authorities are currently investigating six cases of possible fraudulent conduct and 13 cases of conflict of interest.

(2) The DTCs are illiquid. As at 8 August 1986, they had only cash and fixed deposits of $97.9m, most of which were pledged against bank loans of $51.9m. Most of their assets were tied up in property and shares, which are subject to large losses if liquidated under conditions of forced sale.

(3) Many of the DTCs are insolvent. Twenty one out of the 24 DTCs have negative capital, after adjusting for losses. Altogether, the DTCs have negative capital of $600.8m, which therefore lead to losses for the depositors. To place the DTCs into a viable position, their capital must be increased.

(4) Many DTCs have problems of long-term viability. Because too much assets are funded from short-term deposits and are tied in projects with long gestation periods, the income from their investments are not sufficient to meet their interest payments. On pure commercial grounds, the accountants recommended that 11 out of 24 DTCs be placed in liquidation, since they cannot earn sufficient cash flow to meet their interest payments and overheads. Any solution must comprise an element to reduce their interest costs on loans and deposits.

(5) The co-operatives need time to rehabilitate or realize their assets in an orderly manner to meet their deposit liabilities. With proper management, tight supervision and a viable financial structure (which is likely to require a portion of deposits to be capitalized), the DTCs may be able to reduce the net losses to the depositors.

(6) The depositors need some liquidity immediately. Any solution must take into consideration funding to meet the need for liquidity by the depositors.

(7) Many DTCs had contravened the rules and regulations. Fourteen out of 24 DTCs did not have borrowing powers granted by JPK. Seven out of the 10 DTCs which had borrowing powers exceeded their limits. Only three had kept within their borrowing limits. Numerous DTCs did not adhere to the minimum liquidity ratios required by the authorities. Many investments and loans were made against the specific disapproval of JPK or without approval.

...

47 After taking into the views of the ACC and submissions by the depositors and the DTC management, the government has decided on three lines of action as follows:

(1) *Liquidation.* Due to the large losses sustained by two DTCs, which had also suffered from gross mismanagement, both KOSATU and SAKAPP, each with a net asset backing per $1 of deposit estimated at 30 sen and 37 sen respectively, should be placed in liquidation. Receiver for these two DTCs would be appointed to recover whatever assets are available for distribution to the depositors. Some liquidity loans will be made available to the receiver to pay some funds back to the depositors, depending on the net assets available for distribution.

(2) *Voluntary unfreezing.* In view of the special circumstances surrounding KSM, which had suffered large losses (as yet unrealized) due to the sharp fall in the price of its investments in shares, leading to a net asset backing of 41 sen per $1 of deposit, the DTC would be unfrozen pending a decision from the management and its members on its appropriate course of action. The co-operative could, if their members so wish and if they are able to negotiate satisfactory terms with the banks and finance companies, join the third course of action.

(3) *Transfer the deposit liabilities and the accompanying assets to strong banks and finance companies.* For the other 21 DTCs, the banks and finance companies have *agreed in principle and in the national interest* to assume the deposit liabilities of these DTCs at the net asset value of each DTC, subject to mutual agreement on the terms and conditions of exchange and the depositors and members of the DTCs agreeing to the restructure scheme. The depositors will have to agree to some restructure of their terms of deposit, including interest at not more than 6% pa for an extended time period, depending on the quality of assets of the DTC concerned.

Learned counsel had reiterated that the scheme was started in January 1988 by the Central Bank when they amended the Central Bank of Malaysia Ordinance 1958 by adding s 31B where, among other things, provision is made for the Central Bank to make an order in respect of a deposit-taker to protect the interest of its depositors by making an order, with the concurrence of the Minister, published in the Gazette to provide for the Central Bank to purchase shares in a licenced finance company, to make advances to a licenced finance company for their utilization solely to acquire the property and liabilities of the deposit-taker or the interests of its depositors or to make advances of its funds to a bank solely to acquire a licenced finance company which shall acquire the property and liabilities of the deposit-taker or the interests of its depositors.

To give effect to these provisions, the Central Bank may authorize the licenced finance company to undertake a reconstruction exercise, purchase and acquire the property and liabilities of the deposit-taker and the interest of its depositors, enter into such arrangement, agreement or transaction with the deposit-taker or its depositors as may be necessary, expedient or desirable or do such other act or thing to ensure the successful implementation of the order.

Reverting to the proceedings in the court below, the appellant had sued the respondent on a liquidated claim, and on an application for summary judgment being filed, the court had ordered the following

A preliminary issue to be tried, and that is whether the respondent, on the facts of the case and on the construction of the Order and the agreement dated 30 January 1988 between the receiver of the first defendant and the second defendant, can be held liable for the purported debt of the first defendant to the appellant as prayed in the writ and statement of claim.

B The background facts had been adequately stated by the learned trial judge KC Vohrah J as follows:

> In 1986, the country experienced a serious problem relating to deposit-taking co-operatives ('DTCs') which started with the heavy withdrawals on deposits with Koperasi Belia Bersatu Bhd and its inability to meet the deposit liabilities.
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> The Government of Malaysia promulgated the Essential (Protection of Depositors) Regulations 1986 on 23 July 1986 and empowered Bank Negara Malaysia to freeze the assets of Koperasi Belia Bersatu Bhd and its key management, and to investigate into the affairs of the co-operative.
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> Following heavy withdrawals on the deposits of other DTCs and at the
> D request of the boards of directors of several large DTCs, the government froze the assets of 23 other DTCs on 8 August 1986 under the Essential Regulations and appointed 17 firms of accountants to assist Bank Negara Malaysia in its investigations (see Lampiran kepada Kertas Perintah 50 Tahun 1986 — Investigation Report On 24 Deposit-Taking Co-operatives, p 21, para 2).
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> E Among the 24 DTCs investigated was the first defendant. The government proposed the taking of two courses of action in respect of three DTCs and another course of action against the other 21 DTCs which included the first defendant, this latter course being this:
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> '(3) Transfer the deposit liabilities and the accompanying assets to strong banks and finance companies.
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> F
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> For the other 21 DTC's, the banks and finance companies have agreed in principle and in the national interest to assume the deposit liabilities of these DTC's at the net asset value of each DTC, subject to the mutual agreement on the terms and conditions of exchange and the depositors and members of the DTC's agreeing
> G to the restructure scheme. The depositors will have to agree to some restructure of their terms of deposit, including interest at not more than 6% pa for an extended time period, depending on the quality of assets of the DTC concerned.
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> (See p 33 of the report).'

H The appellant contends that cl 4.04 of the agreement between the first defendant and the second defendant has no effect because all the assets and liabilities of the first defendant were vested in and transferred to the second defendant and then to the appellant on the coming into force of the Order in view of para 4 thereof. Consequently, the agreement two days later cannot be said to have taken away the rights of the appellant to claim
I payment of the liabilities vested and transferred by the Order. The opening words of the relevant paragraphs must refer to an existing agreement at the time of the Order, and in the court below, learned counsel for the appellant had cited *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 where the view was expressed that the court would not follow a construction

of a statute that would cause great hardship to the general public where another interpretation is available. Applying that principle to the present case, to accede to the respondent's argument that 'subject to any agreement' would include an agreement entered into after the coming into force of the Order would cause great hardship and injustice in that it would take away vested rights from innocent parties where the only remedy would be against the first defendant which had already become an empty shell, whose assets have been transferred to the second defendant and then to the respondent.

As far as learned counsel for the respondent is concerned, the words 'subject to any agreement' are grammatically capable of one meaning only, and that is to cover all agreements on whatever date they were entered into whether before or after the Order came into effect and this is emphasized by the word 'any'. In addition, para 3 of the Order had clearly stipulated that only deposit liabilities were to be assumed by the second defendant.

The learned trial judge had gone on to say:

> Before I go further, let me point out that the arguments of both parties have gone on the assumption that an agreement between Kewangan Usahasama Makmur Bhd (the second defendant) and any of the deposit-takers appearing in the Schedule to the Order can be made before, on, or after the date of coming into force of the said Order. The assumption is a perfectly valid one having regard to fact that the said Order does not expressly or implicitly prohibit the entering into an agreement after 28 January 1988.
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> I now come to the arguments put forward by the parties. I agree with the conclusion of the third defendant but for different reasons. My view is that the clear tenor of s 31B of the Act and of the said Order is that the Order was made to protect the interest of the depositors, those who put in deposits with the deposit-takers not so much others who had a contractual relationship with the deposit-takers in respect of the other business undertakings where liabilities had arisen. The language used in and the scheme laid out in s 31B of the Ordinance clearly underline Parliament's concern for protecting the interests of depositors in the deposit-takers and the reason why it was expedient to give power to Bank Negara to make such an order as the one that was made.

The concluding paragraphs of the learned trial judge's judgment state:

> As will be noted, the emphasis is the protection of the depositors and their deposits with the deposit-takers. To be noted, too, is that in respect of para 3 of the Order, specific mention is made not of 'liabilities' but of 'deposit liabilities' of the deposit-takers and of 'deposits' of the depositors in the deposit-takers and the intent is clear that the Order is to secure the interest of the depositors in regard to the corresponding deposit liabilities of these deposit-takers and this is made clear in the mandatory language used in sub-para (2) of the provision that the second defendant 'shall repay' the repayable deposits partly in cash and partly in shares, thus:
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> '(1) ...
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> (2) In consideration of the advance of funds and the transfer of the properties, including deposits, and liabilities referred to in sub-para (b) of the sub-para (1), Kewangan Usahasama Makmur Bhd *shall repay each of the depositor his repayable deposit partly in cash*

('the cash portion') and *partly in shares* in Kewangan Usahasama Makmur Bhd of one ringgit each ('the share portion')'. (Emphasis added.)

Paragraph 4 of the Order, which is in issue, on the other hand is not concerned with deposit liabilities but with other liabilities and with the properties of the deposit-takers (including the first defendant) and the language does not impose mandatory obligations. The language envisages that non-mandatory obligations in the matter specified in sub-paras (a) to (i) could have been entered into contractually.

The words 'subject to any agreement between the specified deposit-taker and Kewangan Usahasama Makmur Bhd, the following shall be deemed to be operative on the date of the coming into effect of this Order ...' can only have reference to agreements entered into before the coming into effect of the Order where the agreements did not specifically deal with any of the subject matters referred to in sub-paras (a) to (i) (like 'properties' — sub-para (a), 'deeds of assignment' or 'order of court' — sub-para (b), 'existing contracts' — sub-para (c), etc). In those arguments where any of the relevant sub-paras (a) to (i) relating to the subject matter has not dealt with, then the appropriate provision of sub-paras (a) to (i) will apply.

What has to be noted about the matters in the subparagraphs is that they apply only if there are no contractual provisions for them in the agreements made before 28 January 1988 and the legal device of using a deeming provision fills in the gaps of an agreement that has not dealt with the matters therein. But for the period after the effective date, parties were certainly aware or must be assumed to have been aware of the subject matters in the subparagraphs in para 4 and could deal with them consensually in any way they liked. By the very nature of the subject matters dealt with in para 4, not all of them would arise in all the agreements to be dealt with and it would be ridiculous to force parties to have such matters dealt with although not relevant. My view is that if the provisions of para 4 of the Order had to be applied to all agreements made after the effective date, the Order should have explicitly stated so. Thus, cl 4.04 of the agreement between the first defendant and the second defendant excluding liabilities spelt out therein is valid.

We have carefully considered the arguments canvassed by learned counsel for both the parties, the relevant authorities, the construction of the Order and the agreement, and the conclusion of the learned trial judge with which we fully agree. We are unanimous in our view that the respondent cannot be held to be liable for the purported debt of the first defendant to the appellant. We had accordingly dismissed the appeal with costs and ordered the deposit to be paid to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by Azra Azman-Parry